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IN THE

SUPREME COURT OF THE UNITED STATES

No. 1150

ALLEN WILSON GILLS, PETITIONER

v.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

No.

ALLEN WILSON GILLS, PETITIONER

v.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Petitioner respectfully asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, which affirmed petitioner's conviction in the United States District Court for the Middle District of North Carolina on two counts of violating the Internal Revenue laws relating to distilled spirits.

OPINIONS BELOW

The opinion of the District Court for the Middle District of North Carolina is not officially reported. The opinion of the Court of Appeals has not yet been officially reported. Both opinions are annexed hereto as an Appendix (App. 1a-18a, infra).

JURISDICTION

The judgment of the Court of Appeals was entered on March 2, 1966 (App. 18a). The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the double jeopardy clause of the Fifth Amendment prohibited petitioner's subsequent prosecution and conviction for removing and transporting untaxpaid distilled spirits when the petitioner had already been tried in a federal prosecution for the commercial hauling of the same untaxpaid distilled spirits.

STATUTES INVOLVED

Title 26, United States Code:

Section 5604 (a) (1)

> "Any person who shall transport, possess, buy, sell, or transfer any distilled spirits, required to be stamped under the provisions of Section 5205 (a) (2), unless the immediate container thereof has affixed thereto

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*Citations to record and appendices in the petition have been abbreviated as follows:

Appellant's Appendix in Court of Appeals—At. A.

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a stamp as required by such section shall be fined not more than $10,000.00, or imprisoned not more than 5 years, or both, for each such offense.

* * *

Section 5601 (a) (12)

"Any person who removes, other than as authorized by law, any distilled spirits on which the tax has not been paid or determined, from the place of manufacture or storage, or, from any instrument of transportation, or conceals spirits so removed shall be fined not more than $10,000.00, or imprisoned not more than 5 years, or both, for each such offense."

* * *

Section 5205 (a) (2)

"No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof is stamped evidencing the determination of the tax or indicating compliance with the provisions of this chapter."

Title 16, United States Code:

Section 3. National Parks, reservations, and monuments; supervision

"The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the juris-

diction of the National Park Service, and any violation of any of the rules and regulations authorized by this section and sections 1, 2, 4, 22, and 43 of this title shall be punished by a fine of not more than $500.00 or imprisonment for not exceeding six months or both, and be adjudged to pay all costs of the proceedings . . ."

* * *

Title 36, Code of Federal Regulations:

Section 1.37 Commercial Trucks.

"(a) The term "commercial truck" as used in this section shall include but not be limited to trucks, station wagons, pickups, passenger cars or other vehicles used for rental or used in transporting movable property for a fee or profit, either as a direct charge to a second party, or as an incident to other services provided to a second party or in connection with any business.

"(b) The use of the government roads of any park or monument by commercial trucks, when such trucking is in no way connected with the operation of the park or monument, is prohibited, except that in emergencies special trucking permits may be issued by the superintendent, for which a fee will be charged. (The schedule of commercial trucking fees is to be found in Part 6 of this chapter.)

"(c) The superintendent may, in his discretion, issue permits without charge for trucks used on Gov-

ernment roads in connection with private lands situated within the boundaries of the park or monument.

"(d) Trucking over roads which are officially posted indicating no trucking is allowed shall be deemed a violation of this section."

* * *

Section 1.91 Penalties.

"(a) Any person who violates any provision of the rules and regulations in this chapter, or as the same may be amended or supplemented, in regard to any national park or monument not specified in paragraph (b) or (c) of this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $500.00 or imprisonment for not exceeding 6 months, or both, and be adjudged to pay all costs of the proceedings."

STATEMENT

On December 2, 1964, the petitioner, Allen Wilson Gills, was traveling a closed highway within the National Park Service, known as the Blue Ridge Parkway which lies within Allegheny County, North Carolina. The Parkway had been closed due to ice and snow conditions; however it was clear that a significant amount of traffic was illegally using the Parkway with the acquiescence of the Park Rangers on December 2, 1964 (At. A. 43). The petitioner's vehicle was the only vehicle stopped for traveling on the closed Parkway on December 2, 1964, and his vehicle was

not stopped by a Park Ranger but by a North Carolina State Trooper, Charles M. Ammons (At. A. 29). The Blue Ridge Parkway is about seven miles in length.

The North Carolina State Trooper stopped petitioner's automobile because he had been requested to do so by the National Park Rangers (At. A. 32). It is not clear why the National Park Rangers felt it necessary to enlist the assistance of the North Carolina State Police to stop a vehicle which to their knowledge was doing nothing more than traversing a closed Parkway, an occurrence which they clearly had power to prevent. When the petitioner's vehicle was stopped, the North Carolina State Trooper noticed an odor of alcohol but could see no alcohol nor containers of alcohol in the automobile (At. A. 32). The State Trooper asked the petitioner if he had done anything which had given the Rangers a reason for wanting to see him and petitioner replied in the negative (At. A. 32). The State Trooper became inquisitive about the contents of the trunk of petitioner's automobile, and with a key that had been furnished by petitioner, unsuccessfully attempted to open the trunk of the automobile (At. A. 32). A few moments later when the Rangers arrived on the scene in another automobile, petitioner fled down the mountainside. After a chase petitioner was taken into custody and with another set of keys that was found on him, his trunk was opened and the contraband alcohol discovered (At. A. 33, 41).

The petitioner was immediately charged with the offenses of violating 36 C.F.R. 1.18 pertaining to traveling on a closed National Parkway and 36 C.F.R. 1.37 pertaining to the commercial hauling of movable property for a fee or profit on the National Parkway. It is clear that the

movable property contemplated by the charge under 36 C.F.R. 1.37 was the contraband alcohol discovered in the trunk of petitioner's automobile (At. A. 49). The maximum penalty for a violation of 36 C.F.R. 1.37 is a $500.00 fine and six months in confinement.

The aforementioned cases were tried by Ralph Davis, United States Commissioner, in Wilkesboro, North Carolina, on December 15, 1964. The petitioner entered not guilty pleas to both charges; however the Commissioner found petitioner guilty as to driving on the closed Parkway and not guilty of commercial hauling (At. A. 52).

Shortly after the petitioner's arrest on the aforesaid charges, Alcohol and Tobacco Tax Investigator R. A. Schmidt charged the petitioner with offenses relating to the Internal Revenue laws regulating the removing and transporting of untaxpaid whiskey (At. A. 49). These charges resulted in the subsequent indictment by the Grand Jury for the District Court in the Middle District of North Carolina for violations of 26 U.S.C. Sec. 5601 and Sec. 5604. The first count of the indictment charged that on December 2, 1964, the petitioner did unlawfully remove certain distilled spirits on which the appropriate tax had not been paid or determined from the place of manufacture or storage, and did conceal the same. The second count charged that on the same date the petitioner possessed and transported distilled spirits, the immediate containers thereof not having the required stamps.

The petitioner was subsequently tried on the whiskey charges on March 22, 1965, in the United States District Court for the Middle District of North Carolina, Wilkesboro Division. Over petitioner's objection that this second

prosecution served to place him twice in jeopardy for the same offense, the District Court denied a motion to dismiss the indictment (At. A. 20). Petitioner pleaded not guilty but was convicted and sentenced to imprisonment for twelve months and ordered to pay a fine of $1,200.00 (At. A. 18). His conviction was affirmed by the Court of Appeals on March 2, 1966 (App. 17a).

REASONS FOR GRANTING THE WRIT

The evidence produced at the trial before the United States Commissioner on December 15, 1964, on the offense of commercial hauling was the same evidence and involved the same conduct of the appellant on the afternoon of December 2, 1964, as the evidence produced to sustain the two counts of the indictment on the Title 26 offenses. In the first case on December 15, 1964 the government tried the petitioner for the commercial hauling of the untaxpaid whiskey which was discovered in his vehicle on the afternoon of December 2, 1964. In the second case on March 22, 23, 1965 the government tried and convicted the petitioner for violations of the Internal Revenue laws relating to liquor based on the same removing and transporting of the untaxpaid whiskey that occurred on the afternoon of December 2, 1964.

It makes no difference that the petitioner was acquitted at the first trial. The prohibition of the Fifth Amendment against being twice put in jeopardy of life or limb for the same offense is not against being twice punished, but against being twice put in jeopardy; and the accused whether convicted or acquitted is equally put in jeopardy

at the first trial. *U. S.* v. *Ball,* 163 U. S. 662, 16 S. Ct. 1192, 41 L. Ed. 300; Ex parte Lang, 18 Wall 163, 169, 21 L. Ed. 872.

That an accused is constitutionally protected from successive prosecutions even though his conduct may violate more than one statute was recognized in *Ex parte Nielsen,* 131 U. S. 176, 9 S. Ct. 672, 33 L. Ed. 118. In *Nielsen* the defendant had been convicted of the misdemeanor of cohabiting with more than one woman. He challenged a subsequent prosecution and conviction for the felony of adultery upon the ground that he had been prosecuted twice for the same acts. The United States Supreme Court invalidated the second conviction upon the ground that *Nielsen* had been unconstitutionally placed in jeopardy twice for the same offense. This result was reached though in *Nielsen* each crime required proof of an element which the other did not.

The petitioner does not attack *Blockburger* v. *U. S.,* 284 U. S. 299, 52 S. Ct. 180, 76 L. Ed. 306; *Albrecht* v. *U. S.,* 273 U. S. 1, 47 S. Ct. 250, 71 L. Ed. 505; and *Gore* v. *U. S.,* 357 U. S. 386, 78 S. Ct. 1280, 2 L. Ed 1405. These cases, in divided opinions, uphold the validity of convictions secured at one trial founded on multi count indictments arising out of one act or transaction on the theory that each of the offenses in the separate counts requires proof of a different element. In all these cases, however, the several offenses were prosecuted simultaneously.

Those cases, however, clearly do not establish the validity of successive federal prosecutions of the same person for the same act or transaction. This distinction was forcefully

made by Mr. Justice Brennan in *Abbate* v. *U. S.*, 359 U. S. 187, 79 S. Ct. 666, 3 L. Ed. 2d 729. There, the majority held that the Fifth Amendment's double jeopardy clause did not prohibit successive state-federal prosecutions for the same criminal conduct. The majority rested its decision on the ground that the same act may offend both the national and state sovereignties and may be punished by both. *U.S.* v. *Lanza,* 260 U.S. 377, 43 S.Ct. 141, 67 L.Ed. 314.

In *Abbate,* the government urged as an alternate ground for decision that the two statutes under which the petitioner had been prosecuted were designed to protect different interests and required different evidence for conviction, threby relying on *Blockburger* and *Gore.* Mr. Justice Brennan, who had written the majority opinion in *Abbate,* considered the implications of the government's alternate argument to be "so disturbing as to require comment". In a separate opinion Mr. Justice Brennan said at page 735 of 3 L.Ed. 2d:

> "I cannot escape the fact that this reasoning would apply equally if each of two successive federal prosecutions based on the same acts was brought under a different federal statute, and each statute was designed to protect a different federal interest."

Mr. Justice Brennan pointed out that neither the same evidence test nor a separate interest test has been sanctioned by the United States Supreme Court under the Fifth Amendment except in cases in which consecutive sentences were imposed on convictions of several offenses at a simultaneous trial of the offenses. It was pointed out that although the accused may be punished separately and cumu-

latively for various aspects of a single transaction he is subject to only one prosecution and one trial. At page 736 of 3 L.Ed. 2d he said:

> "The basis of the Fifth Amendment protection against double jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts."
>
> "The underlying idea . . . is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity."

The cases permitting multiple punishment for a single course of conduct involve cumulative sentences imposed after a single prosecution. The essence of the double jeopardy clause is that an accused shall not be harassed by successive trials. Separate prosecutions of the same criminal conduct can be far more effectively used by a prosecutor to harass an accused than can the imposition of consecutive sentences for various aspects of that conduct. For example, separate prosecutions, unlike multiple punishments based on one trial, raise the possibility of an accused acquitted by one jury being subsequently convicted by another for essentially the same conduct. At page 737 of Mr. Justice Brennan's opinion in 3 L.Ed. 2d, this is said:

> "Repetitive harassment in such a manner goes to heart of the Fifth Amendment protection. This protection cannot be thwarted either by the same evidence test or because the conduct offends different federal statutes protecting different federal interests. The prime consideration is the protection of the accused from the harassment of successive prosecutions, and not the justification for or policy behind the statutes violated by the accused. If the same acts violate different federal statutes protecting separate federal interests, those interests can be adequately protected at a single trial by the imposition of separate sentences for each statute violated."

Therefore, Mr. Justice Brennan pointed out that although the Court in *Gore* found no violence to the guarantee against double jeopardy,

> ". . . when the same acts are made to do service for several prosecutions at one trial, I think not mere violence to, but virtual extinction of, the guarantee results if the federal government may try people over and over again for the same criminal conduct just because each trial is based on a different federal statute protecting a separate federal interest."

The problem of successive federal prosecutions for the same criminal conduct was before the Supreme Court in *Petite* v. *U.S.*, 361 U.S. 529, 80 S.Ct. 450, 4 L.Ed. 2d 490, arising from the Fourth Circuit. Following a Pennsylvania conspiracy conviction, the petitioner challenged his subsequent Maryland conviction of the substantive offense which was the object of the conspiracy on the ground of former jeopardy.

With former jeopardy as the sole issue before the Supreme Court, the government filed a motion for an order vacating the judgment below and remanding the case to the District Court with directions to dismiss the indictment on the ground that it is the policy of the federal government,

> "... that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcements."

The Supreme Court majority remanded and directed that the District Court vacate its judgment and dismiss the indictment. The Court did so in accordance with the settled rule that it would not "anticipate a question of constitutional law in advance of the necessity of deciding it". Three Justices dissented on the ground that the double jeopardy clause was an insurmountable barrier to the second prosecution for the substantive offense.

The Solicitor General thus frustrated a decision on the question of successive federal prosecutions for the same conduct. The same result was reached in *Marakar* v. *U.S.*, 370 U.S. 723, 82 S.Ct. 1573, 8 L.Ed. 2d 803, after an identical motion by the Solicitor General.

Marakar and *Petite* involved successive prosecutions for a substantive offense and the conspiracy to commit the same. The two offenses are rarely, if ever, committed together in point of time, they involve separate acts, separate transactions, and entirely different elements and evidence.

The facts in this case are more favorable to the petitioner in that the offense for which petitioner was tried involved the same act, the same transaction, the same course of conduct, and the same evidence, which the government has, at its election, separated into multiple successive prosecutions. The government agrees that the petitioner was originally tried for commercial hauling of the untaxpaid whiskey. The evidence in support of that charge was neither less than nor more than the evidence used to support the Title 26 charges.

The present case illustrates that the possibilities of harassment cautioned against by Mr. Justice Brennan in *Abbate* are not illusory.

It is respectfully submitted that the action of the government in subjecting the petitioner to two successive prosecutions for the same criminal act is within the prohibition of the double jeopardy clause. The announced policy of the government in *Petite* and *Marakar,* the principles enunciated by Mr. Justice Brennan in *Abbate,* and the indistinguishable decision of this court in *Nielsen* compel reversal in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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March, 1966

APPENDIX

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

OPINION OF JUDGE EDWIN M. STANLEY

THE COURT: All right. First with respect to the motion to dismiss the indictment in this case by reason of the fact that he was tried and acquitted by United States Commissioner Ralph Davis of the offense of commercial hauling on the Blue Ridge Parkway and that the evidence in that case was identical to the evidence and involves identical conduct which forms the basis of this prosecution, and consequently the present trying of the defendant places him twice in jeopardy for the same offense in violation of the double jeopardy clause of the Fifth Amendment of the Constitution of the United States: It is denied.

If either side desires any specific findings of fact in regard to the facts upon which the ruling of the Court is based, the (tr. 60) Court will be glad to find any fact requested. It is deemed sufficient to state at this time that the evidence the Court feels—and it is regarded as uncontradicted—However, the Court has no way of knowing upon what grounds or upon what basis the United States Commissioner found the defendant not guilty of commercial hauling. It could have been that the Commissioner felt that the hauling of contraband does not constitute commercial hauling within the meaning of 36 CFR 1.37. It might have been for some other purpose. In any event, the Commissioner had this case before him at the same time he was considering the

evidence in the commercial hauling case, and he found probable cause in this case and dismissed the commercial hauling.

Without going into any lengthy discussion of the legal principles here involved, the Court is of the opinion that they are generally stated in the Rules and in the opinion in McGann versus United States, 261 F.2d 956, this being a Fourth Circuit case, decided on December 13, 1958, in which Chief Judge Sobeloff wrote the opinion.

Certainly under any view of the matter there were elements, there are elements present in this case which it's necessary for the Government to show in order to sustain (tr. 61) a conviction that would never be present in a commercial hauling case; and since the commercial hauling warrant and the indictment in this case require different elements of proof and in no way relate to the same offense, the Court is of the opinion that the defendant has not been put in double jeopardy by reason of his trial and acquittal on the commercial hauling case.

With respect to the defendant's motion to suppress the evidence, the Court finds that about a week before December 2, 1964, a 1957 model blue Dodge or DeSoto automobile bearing Virginia license was in near collision with a snowplow being operated by the Park Service on the Blue Ridge Parkway; that on December 2, 1964, the Park Rangers were notified by one of the maintenance employees of the Park Service that the same or a similar automobile was seen traveling south on the Blue Ridge Parkway at a time when the Parkway was closed to vehicular traffic; that as a result of this information the District Ranger requested the assistance of a member of

the State Highway Patrol in apprehending the driver of the vehicle, in anticipation that the vehicle would later return to the Parkway traveling north in the direction of Virginia; that Highway Patrolman Ammons responded to the call and at about 4:00 P. M. on December 2, 1964, (tr. 6) while talking with Rangers Pendry and Hankins, saw a 1957 DeSoto automobile traveling north on the Parkway that met the general description of the vehicle earlier reported by the maintenance employees. Neither the Rangers nor the Highway Patrolman knew the identity of the operator of the vehicle or had any prior information about any illegal activities being carried on by the defendant. The automobile later discovered to be operated by the defendant was pursued by Rangers Pendry and Hankins in a Government car—I suppose it was a Government car; I don't know if the evidence shows that or not—and the Highway Patrolman Ammons in a state vehicle. The Rangers turned off the Parkway upon Highway 89, thinking there was a possibility that the operator of the DeSoto automobile had also turned on this highway, and Patrolman Ammons continued north on the Parkway. The Rangers, not locating the DeSoto automobile on Highway 89, returned to the Parkway and proceeded north, at which time they saw the DeSoto automobile stopped on the Parkway and also saw Patrolman Ammons' vehicle stopped nearby and the defendant and Patrolman Ammons together near the rear of the defendant's DeSoto automobile. About this time the Rangers saw the defendant run from the vicinity of his vehicle down an embankment or the edge of the mountain. The Rangers pursued and apprehended the (tr. 63) defendant after chasing him about one-half of a mile. The defendant was placed under arrest by the Ranger at the time of his apprehension for driving a vehicle

upon the Parkway while closed. Immediately following the arrest, the defendant was handcuffed and his person was searched. Among other things, the Rangers found upon searching the defendant a key ring with keys on it, a billfold, and a pocketknife. The defendant was then returned to where his automobile was stopped on the Parkway.

In the meantime, Patrolman Ammons had discovered the DeSoto automobile and had stopped it on the Parkway prior to the arrival of the Rangers. After stopping the defendant's vehicle, Patrolman Ammons engaged in some conversation with the defendant. The exact extent of the conversation was not remembered by the patrolman, but generally the patrolman inquired of the defendant as to why, if he knew, the Rangers were trying to apprehend him. When the window on the defendant's car was rolled down after he was stopped, the patrolman smelled the strong odor of alcohol in the DeSoto automobile. He looked in the automobile and could see no packages or any other object indicating the presence of any containers. The patrolman then asked the defendant about looking in the trunk of his automobile. The defendant either consented to a (tr. 64) search of the trunk of his vehicle or at least raised no objection and volunteered to open the trunk if he could find the key. The defendant then tried one or more keys that did not fit the trunk and then gave one or more keys to the patrolman for use in trying to open the trunk. The keys given the patrolman would not fit the trunk lock. It was at about this time that the defendant with his keys fled the scene, upon the arrival of the Park Rangers.

When the Rangers returned the defendant, they likewise smelled the strong odor of whiskey in the defendant's automobile but no packages or containers were visible in the

interior of the vehicle. With one of the keys on the key ring that had been taken from the possession of the defendant after his arrest for operating on the Parkway while closed, the trunk of his automobile was opened by Patrolman Ammons at the request of one of the Park Rangers, where a large quantity of nontaxpaid distilled spirits was discovered. The trunk was then relocked and the defendant's DeSoto automobile was driven by one of the Rangers to a nearby maintenance station where it was kept in the custody of the Rangers until ATU Agent Schmidt, who had been notified by one of the Rangers, arrived at the scene. Mr. Schmidt, on examining the contents of the trunk of DeSoto automobile being operated by (tr. 65) the defendant, discovered that it contained one hundred and thirty-one and a half gallons of nontaxpaid distilled spirits in one-half-gallon fruit jars. Most of the fruit jars were in brown Kraft bags. About halfway down in the stack of fruit jars, Agent Schmidt discovered a broken fruit jar and also discovered that the contents of the broken jar had spilled upon the bags and jars that were underneath it.

The Parkway was closed on December 2, 1964, by the Rangers due to the presence of ice and snow on the Parkway, and it was under these circumstances unlawful for vehicles to be operated upon the Parkway while closed. Appropriate signs had been placed at all entrances to the Parkway indicating it was closed. However, other vehicles were upon the Parkway on this same date, but none of them were stopped nor the occupants arrested by the Rangers. The number of other vehicles is not clear, but at least other vehicles were seen upon the highway.

* * *

THE COURT: Under these facts, the Court is of the opinion, and so holds, that the defendant did not lawfully consent to a search of the trunk of the vehicle. While there was an indication that he had no objection to a search of the trunk and actually pretended to try to open the trunk and to assist the patrolman in opening the trunk, it is clear to the Court that the defendant had no intention of opening the trunk of the vehicle knowing what was stored there and that his consent, the consent given to the patrolman to search was not in law a waiver of his rights.

While the defendant was stopped by the highway patrolman for the Rangers and at their request, and knew that the highway was closed—that the Parkway was closed, knew of the presence of snow and ice on the Parkway, the (tr. 67) Court finds that the defendant was not actually placed under arrest for this offense until he was chased by the Rangers and apprehended some half a mile from the scene, from the place where his vehicle was stopped by the patrolman. Clearly, in the opinion of the Court, the Rangers had a perfect right to search the person of the defendant incident to his arrest, which the Court finds to have been lawful and the result of a misdemeanor committed by the defendant in the presence of the Rangers.

As to whether the Rangers or the patrolman under the facts found had the right to use the keys taken from the defendant under the search incident to his arrest and open the trunk of his vehicle without his consent is not decided. The Court is of the opinion that this particular phase of the case—that logical argument can be made by both sides with reference to this particular phase of the case.

Without attempting to analyze all the cases cited by the parties or to discuss the contentions made by both parties on this question, the Court first calls the attention of the parties to the case of United States versus Matthews, 23 Federal Rules Decision, 169, which is a 1959 case decided by Judge Steckler of Indiana. In that case an automobile was seen speeding by the officer. It was stopped and (tr. 68) the defendant placed under arrest for speeding and was taken immediately before a magistrate. The defendant was placed in jail in default of his ability to pay a fine. The officer then went to the place where the defendant's vehicle had been stopped, for the purpose of bringing it into a garage and preserving it pending the defendant's release from jail. The officers, in bringing the vehicle to the police station, found a pistol somewhere in the vicinity of the front seat of the vehicle and then, taking the keys which had been obtained from the defendant, searched the vehicle and found 139 gallons of nontaxpaid whiskey. The defendant moved to suppress the evidence. The Court denied the motion and cites a number of cases in support.

Now the case of United States versus Tate, 209 Federal Supplement 762, a 1962 case decided by Judge Layton of the District of Delaware and a case upon which the defendant heavily relied, certainly furnishes some support for the position of the defendant with respect to the search of his vehicle incident to his arrest.

However, the case of United States versus One 1963 Cadillac Hardtop, 224 Federal Supplement 210, a 1963 case decided by Judge Grubbs of the Eastern District of Wisconsin, reaches a conclusion and in the opinion of (tr. 69) the Court different from that reached by Judge Layton in the Tate case, but on somewhat different grounds. The same cases are largely cited in both cases.

In any event, the motion to suppress evidence as a result of the opening of the trunk of the defendant's vehicle without his consent is denied on the grounds that the officers, under the circumstances and facts there existing, had reasonable cause to believe that a crime was being committed in their presence. In this connection the Court particularly points to the fact that the defendant, in the opinion of the Court, purposely attempted to prevent the officer from examining the trunk of his vehicle. The fact that the interior of the defendant's automobile smelled strongly of the odor of whiskey and that no containers or other packages could be seen on the inside of the vehicle and the fact that the defendant fled through the snow and ice and down the side of the mountain for some half a mile before he was apprehended by the Ranger; these facts and others constituting the total atmosphere of the case at the time were sufficient to warrant a belief by persons of reasonable caution that a crime was being committed in their presence. The Court is of the opinion that the officers acted reasonably and prudently under the circumstances, and that the total facts then known to the officers justified the search, par- (tr. 70) ticularly when it was discovered that the defendant actually had a key that would unlock the trunk, and that the search as conducted was not unreasonable or one that was against the Constitution of the United States.

Of course, this, as in all cases, presents basically a factual problem; and if there is one common thread running throughout all search-and-seizure questions, it is that you start with the premise that no two cases are alike and then you take the facts in each case and try to find the principles of law as the Court conceives them to be. Now, gentlemen, what that amounts to, as you realize, I am holding that it was not a permissive search; whether they had a right to search incident to the arrest, I think there are arguments both ways, and I am just simply not prepared to make a holding on that. But really it's immaterial since I am firmly convinced that there is reasonable cause to justify the search, without regard to consent or the arrest.

* * *

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 9977

ALLEN WILSON GILLS, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

ROBERT E. MAXWELL, District Judge:

Appellant seeks a reversal in this Court of his conviction in March, 1965, before the District Court for the Middle District of North Carolina. Appellant was tried on a two count indictment charging violations of the Internal Revenue laws relating to the possession, removal, concealment and transportation of nontaxpaid whiskey. Motions to dismiss the indictment and suppress evidence were filed. Appellant entered a plea of not guilty and executed a waiver of trial by jury, in the presence of his counsel, the United States Attorney and the District Court Judge, dated March 22, 1965.

The District Court denied Appellant's motions and found him guilty on both counts of the indictment. In judgment, the District Court sentenced Appellant to a term of twelve months in the custody of the Attorney General and ordered a fine in the amount of twelve hundred dollars.

The indictment in the case under consideration charges the Appellant with violations of Title 26 U.S.C., 5601(a)(12), 5205 (a)(2) and 5604(a)(1).

The evidence before the District Court discloses that on December 2, 1964, because of ice and snow conditions on the Blue Ridge Parkway in the Cumberland Knob section of Allegheny County, North Carolina, the park service had closed this section of the highway to traffic, with appropriate signs and blinking lights to notify the public. It was brought out, in the testimony, that there was a small amount of traffic on the parkway, nevertheless.

Appellant's automobile, by general description, was a suspected earlier violator of the no traffic, closed highway regulation.

Thereafter, a park ranger saw the suspected car pass their position along the parkway and two park rangers in their automobile and a North Carolina state policeman in his automobile gave pursuit. The two park rangers, thinking that the violating automobile may have turned off on a state route, exited from the parkway, while the state policeman continued on the parkway and subsequently overtook Appellant in his automobile.

Before the District Court, the state policeman testified that when the Appellant rolled down the window of his car he could smell the strong odor of "alcoholic beverages" but was unable to see any alcoholic beverage in the vehicle. Appellant at that time was asked if he had anything in the trunk of his car and replied in the negative, and upon inquiry indicated that he did not mind opening the trunk, furnishing a key to the state policeman. They were unsuccessful in the use of the furnished key in opening the car trunk. Appellant told the state policeman that he had no other key.

At this time the two park rangers drove up and upon seeing them the Appellant fled down the mountain side into the woods through ice and snow. The park rangers gave pursuit, chasing him for approximately one-half mile before apprehending him. Appellant was placed under arrest by the rangers and searched. The search produced, among other things, a ring of keys, and upon returning to where the cars were parked the rangers also detected the strong odor of alcohol from Appellant's automobile.

A key from the key ring taken from Appellant was found to be the proper key to open the trunk to Appellant's automobile. Inside the trunk was found a large quantity of nontaxpaid whiskey, contained in half gallon fruit jars, individually wrapped in brown paper bags. More careful investigation, at a subsequent time, disclosed that one of the glass containers had broken, spilling the contents over a considerable area of Appellant's automobile trunk and a portion of the remaining contents of the trunk.

Appellant, before the United States Commissioner, was charged with driving on a closed parkway, 36 C.F.R. 1.18, a petty offense of which the United States Commissioner subsequently, after a plea of not guilty, found him guilty. Appellant was also charged with commercial hauling on the parkway under 36 C.F.R. 1.37, to which the Appellant, before the United States Commissioner, entered a plea of not guilty. He was found not guilty by the United States Commissioner. The Commissioner was of the opinion that there was probable cause as to the Internal Revenue laws relating to nontaxpaid whiskey and Appellant was held to answer the grand jury for the Middle District of North Carolina.

Appellant before this Court assigns two grounds. First, the prosecution of the Title 26 offenses, contained in the indictment before this Court, following the prior trial of Appellant before the United States Commissioner for the petty offense of commercial hauling, improperly places the Appellant twice in jeopardy for the same offense, within the meaning of the Fifth Amendment's double jeopardy clause; and second, under the Fourth Amendment, for-

bidding unlawful searches and seizures, there was not sufficient probable cause to justify the officers searching the trunk of Appellant's automobile.

After a careful review of the record from the trial court and the application of pertinent law, this Court rejects Appellant's contentions of error and affirms the judgment of the trial court.

As to the Fifth Amendment issue raised by Appellant, this Court is guided by the decision in McGann v. United States, 261 F. 2d 956 (4th Cir. 1958), where this Court earlier held, at page 958:

> "But it is an elementary proposition of law that a single act can subject the actor to punishment under two statutes. (Cited cases omitted).
>
> "It is settled that two indictments arising from the same act do not charge the same crime if each indictment requires proof of a fact not essential to the other." (Case citations omitted).

Also presented, in support of the Court's determination of the immediate case, is the decision in Gore v. United States, 357 U.S. 386 (1958), and Blockburger v. United States, 284 U.S. 299 (1932); Albrecht v. United States, 273 U.S. 1 (1927); and United States v. Jones, 334 F. 2d 809 (7th Cir. 1964).

The Appellant relies strongly on ex parte Nielsen, 131 U. S. 176 (1889), and the separate opinion of Mr. Justice Brennan in Abbate v. United States, 359 U.S. 187 (1959).

The main thrust of Appellant's contention before this Court is that the double jeopardy provision of the Fifth Amendment prohibits successive prosecutions. This Court holds that the United States in this prosecution used simultaneous and not successive prosecutions, involving separate and distinguishable offenses. Therefore, this case is not covered by the principles advocated by Appellant.

There is a further interesting sidelight to this case, arising from Appellant's trial before the United States Commissioner, upon the charge of commercial hauling on the parkway. Title 18 U.S.C. Section 3401(b) provides:

> "Any person charged with a petty offense may elect, however, to be tried in the district court of the United States. The commissioner shall apprise the defendant of his right to make such election and shall not proceed to try the case unless the defendant after being so apprised, signs a written consent to be tried before the commissioner."

Section 3402 of the same Title provides a right of appeal from the judgment of the commissioner to the district court in the district in which the offense was committed. Rule 3 of the Rules for Trial of Petty Offenses before United States Commissioners requires: "The commissioner's proceedings shall be entered in his docket, which shall show: (1) The defendant's written consent to be tried before the commissioner; ***." Rule 4 establishes the mechanics for the taking of an appeal after entry of judgment of conviction before the Commissioner.

The record in this case does not reflect this phase of Appellant's difficulties, the basis of his Fifth Amendment claim before this Court. In the absence of a complaint by Appellant, that the petty offense statute and rules were violated, and there being nothing in the record to demonstrate that the United States Commissioner in this instance failed to observe the directives of the statutes and rules in the handling of the matters before him, this Court will not presume that the Commissioner's actions were other than in keeping with the requirements.

As to the remaining ground raised by Appellant, namely that there was not probable cause for the search of the trunk of Appellant's automobile, this Court holds that this search was a lawful search. Carroll v. United States, 267 U.S. 132 (1925); Davis v. United States, 328 U.S. 582 (1946); Go-Bart Importing Company v. United States, 282 U.S. 344 (1931); Brinegar v. United States, 338 U.S. 160 (1949); Draper v. United States, 358 U.S. 307 (1959); Husty v. United States, 282 U.S. 694 (1931).

This Court holds that the "strong odor of alcoholic beverages," detected by the two park rangers and state policemen on two separate occasions, the deceptive effort of Appellant to prevent access by the highway patrolmen to the trunk of his automobile by tendering the wrong key, while retaining the correct trunk key in his pocket, and the subsequent flight by Appellant down a rugged mountain side for approximately one-half mide through

admittedly inclement and adverse weather conditions, the chase lasting until being overtaken by the park rangers, constitute a totality of facts and circumstances which, under the decisions referred to above, create in the opinion of this Court, probable cause for the search complained of by Appellant.

For the reasons assigned and stated, the judgment of the district court is affirmed.

Affirmed.

JUDGMENT

Filed and Entered, March 2, 1966.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 9977.

United States of America,
Appellee,

vs.

Allen Wilson Gills,
Appellant.

Appeal from the United States District Court for the Middle District of North Carolina.

This cause came on to be heard on the record from the United States District Court for the Middle District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

CLEMENT L. HAYNSWORTH
Chief Judge, Fourth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1150

ALLEN WILSON GILLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 11a) has not yet been reported. An opinion of the district court (Pet. App. 1a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1966. The petition for a writ of certiorari was filed on March 25, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's conviction for possessing and transporting non-tax-paid liquor constituted double jeopardy.

STATEMENT

Petitioner was convicted in a non-jury trial in the Middle District of North Carolina on a two count indictment charging possession, concealing and transporting non-tax-paid liquor in violation of 26 U.S.C. 5601(a)(12) and 5604(a)(1). He was sentenced to imprisonment for twelve months and fined twelve hundred dollars.

Petitioner was apprehended on the Blue Ridge Parkway when he was observed traveling thereon while it was closed to the public because of snow and ice. At the time of his arrest a large quantity of non-tax-paid liquor was discovered in his automobile. A complaint was filed charging him with violations of Title 26 with respect to the liquor. He was also charged with two petty offenses—driving on a closed parkway and commercial hauling on the Blue Ridge Parkway, in violation of 36 C.F.R. 1.18 and 1.37. He was tried before a United States Commissioner for the petty offenses at the same time he was accorded a preliminary hearing on the liquor charges. He was convicted on the first petty offense charge, acquitted on the commercial hauling charge, and bound over for the grand jury complaint for liquor violations.

Before trial by the district court of the liquor charges, petitioner moved to dismiss the indictment

upon the ground that he had already been placed in jeopardy for the same offense when he was tried on the charge of commercial hauling. By agreement, ruling on the motion was deferred until the end of the trial, at which time it was overruled (Pet. App. 1a-2a). The court of appeals affirmed the conviction on the liquor charges (Pet. App. 11a-17a), finding that "the United States in this prosecution used simultaneous and not successive prosecutions, involving separate and distinguishable offenses" (Pet. App. 15a).

ARGUMENT

Petitioner's acquittal of the petty offense of commercial hauling on a parkway did not bar his trial for the felony of possessing and transporting non-tax-paid liquor; the elements of the offenses are markedly different. With respect to the commercial hauling charge, it made no difference what kind of goods petitioner was transporting; the elements of the offense were that he was (1) transporting movable goods; (2) on a parkway; (3) for a fee or profit. With respect to the liquor offenses, it made no difference where the goods were being possessed and transported or whether the transportation was for profit; the elements of the offense were that petitioner (1) possessed, concealed, or transported; (2) specific property, *i.e.*, distilled spirits; (3) on which the tax had not been paid or which did not have stamps. The subsequent trial for the felony charges thus involved no violation of the principle of double jeopardy. *Sealfon* v. *United States*, 332 U.S. 575; see, also, *United States* v. *Bayer*, 331 U.S. 532. Indeed, the elements of the

two charges are clearly so different (except for the fact of transportation which the Commissioner did find to have occurred as to the other petty offense) that there is no room for the principle of collateral estoppel recognized in the *Sealfon* decision.

Nor was there any violation of the policy against successive prosecutions for different acts arising out of the same transaction. The government brought at one time all charges arising out of petitioner's conduct on the parkway. Petitioner could not have been tried by a Commissioner without his affirmative election to be tried there, rather than in the district court.[1] Had petitioner elected to be tried on the petty offense charges in the district court, his trial on the petty charges could have been consolidated with the trial of the felony charges covered by the complaint. It was his decision, not the government's, which resulted in two trials.

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[1] 18 U.S.C. 3401(b) provides:

> (b) Any person charged with a petty offense may elect, however, to be tried in the district court of the United States. The commissioner shall apprise the defendant of his right to make such election and shall not proceed to try the case unless the defendant after being so apprised, signs a written consent to be tried before the commissioner.

We are lodging with the Clerk the document showing petitioner's election to be tried before a commissioner.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1966.

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